APPEAL NO. 93324

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). At a contested case hearing held in (city), Texas, on March 25, 1993, the hearing officer, (hearing officer), considered the disputed issue, reframed for good cause, namely, whether temporary income benefits (TIBS) should be paid to the appellant (claimant) for the period from March 12, 1992, to October 5, 1992. The hearing officer concluded that claimant reached maximum medical improvement (MMI) on March 12, 1992, with a 10 percent (10%) impairment rating; that the respondent (carrier) incorrectly terminated claimant's TIBS on July 18, 1992; that the carrier is authorized to terminate claimant's TIBS effective March 12, 1992; that claimant is entitled to TIBS through March 12, 1992, and to impairment income benefits (IIBS) beginning March 13, 1992; that carrier is entitled to credit as IIBS any TIBS paid after March 12, 1992, because it paid them due to the treating doctor's failure to timely report in a correct manner claimant's having reached MMI on March 12, 1992; and that based on his 10% impairment rating, claimant is entitled to 30 weeks of IIBS. Claimant challenges those conclusions urging that claimant's TIBS should be paid to October 5, 1992, and that his IIBS should commence after that date because his treating doctor's Report of Medical Evaluation (TWCC-69) certifying MMI and assigning the 10% impairment rating was not filed with the Texas Workers' Compensation Commission (Commission) until October 5, 1992. Claimant also asserts error in the hearing officer's having excluded from evidence certain documents because claimant failed to exchange them with the carrier. The carrier's response urges our affirmance.

DECISION

The initial disputed issue as framed by the benefit review officer was whether TIBS should be paid for the period from July 18, 1992, to October 5, 1992. That issue was prompted by evidence that claimant's treating doctor, (Dr. C), determined that claimant reached MMI on March 12, 1992, with a 10% impairment rating, that Dr. C stated his determination of MMI on certain Specific and Subsequent Medical Report forms (TWCC-64s) which prompted the carrier to stop the payment of TIBS after July 18th, and that Dr. C's Report of Medical Evaluation (TWCC-69) was not filed until October 5, 1992. It was claimant's contention that his TIBS should have been paid to October 5th when the TWCC-69 was filed and that his IIBS payments should have commenced thereafter. The carrier contended that since Dr. C determined that claimant reached MMI on March 12th, albeit he failed to file a TWCC-69 form until October 5th, its payments of TIBS from March 12th to July 18, 1992, should be credited against the IIBS due claimant. At the close of the evidence and after hearing the relative positions of the parties, reviewing the benefit review conference (BRC) report including the positions of the parties at that proceeding, discussing procedural options with the parties including a continuance and another BRC, and upon being advised by the parties that neither anticipated any additional evidence on the issue, the hearing officer made a good cause determination that the disputed issue should be expanded at the apparent request of the carrier to include the issue of the payment of TIBS

back to March 12, 1992. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7). Neither party asserts error on appeal respecting the hearing officer's treatment of the disputed issue.

Claimant, the sole witness, testified that he injured his right arm and leg, and his back, in a fall at work and it was not disputed that he sustained a compensable injury on (date of injury). The medical records indicated he fell about four feet and landed on his buttocks. Claimant said he was initially treated for his injury by Dr. C, a chiropractor, was subsequently referred to (Dr. M), a neurologist, and that he still receives therapy from Dr. C. According to claimant, Dr. C, while not mentioning MMI, did advise him of his 10% impairment rating. Claimant also stated that the carrier stopped paying benefits on July 18, 1992, and that he next received a check from carrier for $1,500.79 on January 11, 1993. Claimant also said that Dr. M gave him a 17% impairment rating on December 22, 1993. On cross-examination claimant said he does not dispute Dr. C's statement that he reached MMI on March 12, 1992. However, on redirect examination claimant said he does dispute such MMI statement because he doesn't "feel OK yet." No evidence was adduced that claimant disputed Dr. C's impairment rating within 90 days although such was not a disputed issue. *See* Rule 130.5(e).

Upon objection by the carrier for claimant's having failed to exchange it, the hearing officer excluded from evidence a TWCC-64 form of Dr. C, dated May 16, 1991, which stated that claimant was being provided with chiropractic treatment for his sacrum strain/sprain, lumbar myofascitis, and lumbar spondylolysis, and that his anticipated MMI date was August 16, 1991. On TWCC-64 forms dated December 7, 1991, and February 6, 1992, Dr. C indicated that claimant's MMI date was "unknown." However, on TWCC-64 forms dated April 6 and June 4, 1992, Dr. C stated that while claimant still complains of back pain and will be treated as necessary for "supportive care," he reached MMI on March 12, 1992, with 10% impairment. While the four TWCC-64 forms admitted in evidence bore the statement "see attached," it is not apparent as to what was being referenced, given the form in which the exhibits were offered into evidence, although several of Dr. C's treatment records were with these forms. Dr. C's records contain a note to Dr. M dated August 7, 1992, stating that Dr. M had previously done a neurological work-up on claimant and that Dr. C was referring claimant to Dr. M because the latter's clinic was closer to claimant who had transportation problems. According to a TWCC-64 dated August 7, 1992, claimant's last visit to Dr. C was on July 30, 1992. Dr. C then noted that claimant still complained of occasional low back pain and would continue to experience same. In his TWCC-69, Dr. C stated that claimant reached MMI on March 12, 1992, with a 10% whole body impairment rating. According to the attached narrative report accompanying the TWCC-69, a bone scan had revealed a fracture of a part of the L5 vertebra on the right, an MRI had revealed no disc herniation or spinal stenosis, and an EMG and nerve conduction studies were negative.

A series of TWCC-64 forms signed by Dr. M for the period from August 20, 1991, to

February 22, 1992, indicated that claimant's diagnosis was back pain, that surgery was not advised, that the prognosis was guarded, that he should find work other than heavy labor, and that his anticipated MMI date was unknown. Upon the carrier's objection that it had not been exchanged by the claimant, the hearing officer excluded a TWCC-69 from Dr. M, dated "12-22-92," which stated that claimant reached MMI on "12-21-92" with a 17% impairment rating for lower back spondylosis and loss of range of motion.

The hearing officer made the following pertinent factual findings and legal conclusions:

FINDINGS OF FACT

4.[Dr. C], claimant's treating doctor, certified that Claimant reached [MMI] on March 12, 1992, with an impairment rating of 10%.

5.[Dr. C] properly reported his findings to Carrier on a TWCC-69 on or about October 5, 1992.

6.The TWCC-69 reported to Carrier on or about October 5, 1992, was the first document to properly certify the achievement of [MMI] by Claimant.

7.Carrier terminated Claimant's [TIBS] on July 18, 1992, based on [Dr. C's] TWCC-64 dated June 4, 1992.

CONCLUSIONS OF LAW

3.Claimant reached [MMI] on March 12, 1992, with an impairment rating of 10% (TWCC Appeal No. 92453 (Docket No. BU-92-033884-01-BU41) decided October 12, 1992).

4.Carrier incorrectly terminated Claimant's [TIBS] on July 18, 1992, based on [Dr. C's] TWCC-64 dated June 4, 1992 (Article 8308-4.23).

5.Carrier is authorized to terminate Claimant's [TIBS] effective March 12, 1992, based on [Dr. C's] TWCC-69 report (Article 8308-4.23(b)).

6.Claimant is entitled to [TIBS] through March 12, 1992 (Article 8308-4.23(b)).

7.Claimant is entitled to [IIBS] beginning March 13, 1992 (Article 8308-4.26(c)).

8.Carrier is entitled to credit as [IIBS] any [TIBS] paid after March 12, 1992, because it paid them due to the treating doctors failure to timely report in a

correct manner Claimant's achievement of [MMI] on March 12, 1992 (TWCC Appeal No. 92556 (Docket No. AU-91-147608-01-CC-AU41) decided December 2, 1992).

9.Based on his impairment rating of 10%, Claimant is entitled to thirty weeks of [IIBS] (Article 8308-4.26(c)).

Claimant concurs with Findings of Fact Nos. 1 through 3 and 5 through 7. He disagrees with Conclusions of Law Nos. 5 through 9 asserting that claimant's TIBS should have been paid to October 5, 1992, at the least. Respecting Finding of Fact No. 4, claimant points out that the excluded TWCC-64 from Dr. C of May 16, 1991, which stated an anticipated MMI date of August 16, 1991, together with Dr.C's next two TWCC-64s stating the MMI date as "unknown," constitute evidence showing an "inconsistency" to Dr. C's March 12, 1992, MMI date reflected on two later TWCC-64 forms and his TWCC-69.

Claimant argues that the hearing officer's exclusion of Dr. C's May 16, 1991, TWCC-64 and of Dr. M's TWCC-69 prejudiced claimant by preventing him from raising an issue as to when he reached MMI. We find no merit in that position. The disputed issue centered on whether claimant should receive TIBS until October 5, 1992, because of Dr. C's failure to state his determination of the March 12, 1992, MMI date on a TWCC-69 form, rather than on the TWCC-64 forms. There was no issue as to whether claimant's MMI date was subsequent to October 5th but only whether Dr. C's determination of the March 12, 1992, MMI date should be changed to October 5, 1992, because it was not stated on the proper form before October 5th. Regarding issues not raised at the hearing, we have previously observed that "[s]ince the issue was never brought before the contested case hearing, there is no decision of the hearing officer on which to base a proper predicate for review of this matter by the Appeals Panel. (Articles 8308-6.41(b), 8308-6.42(a))." Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991. *And see* Texas Workers' Compensation Commission Appeal No. 91100, decided January 22, 1992.

We find no merit to claimant's assertion that the hearing officer erred in excluding the TWCC-64. When asked, claimant's representative stated she had no evidence the form had been provided to the carrier. As for the exchange of Dr. M's TWCC-69, however, claimant's representative stated it was sent to carrier's adjuster by regular mail on December 31, 1992. Carrier's counsel then further objected stating that the carrier had on December 10, 1992, exchanged its documents with claimant, that claimant thereby had knowledge of the identity of carrier's counsel, and that claimant did not send the TWCC-69 to carrier's counsel so he could have it to prepare for the hearing. The hearing officer commented that claimant's letter was not addressed to the carrier as a specific exchange of information but was merely a copy of a letter claimant sent to the Commission. The hearing officer then excluded the document indicating he did not view

claimant's sending to carrier's adjuster a copy of claimant's letter to the Commission as "an exchange." Regrettably, a copy of claimant's letter was not made a part of the file for appellate review. Article 8308-6.33(d) provides that within a time to be prescribed by Commission rule, the parties shall exchange all medical reports and medical records, and Article 8308-6.33(e) provides that a party who fails to disclose documents at the time when disclosure is required by Article 8308-6.33 may not introduce them unless good cause is shown for not having disclosed such documents. *And see* Rule 142.13 (c). We are not aware of any requirement in the 1989 Act or in the Commission's Rules which precluded the claimant from effecting a required exchange of documents by sending to carrier's adjuster a copy of a letter transmitting such documents to the Commission, assuming, of course, that the copy of the letter to the carrier had with it copies of the documents. We view the hearing officer's error in excluding Dr. M's TWCC-69 as harmless, however, because the document was not controlling on the disputed issue and because the error was not reasonably calculated to cause and probably did not cause the rendering of an improper decision in this case. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 394, 396 (Tex. 1989).

The hearing officer obviously did not view the TWCC-64 forms signed by Dr. C as sufficient to meet the MMI certification requirements of Rules 130.1 and 130.2. The claimant does not appear to disagree and neither do we. *See* Texas Workers' Compensation Commission Appeal No. 92127, decided May 15, 1992, and Texas Workers' Compensation Commission Appeal No.92198, decided July 3, 1992, where we previously discussed certain shortcomings in some TWCC-64 forms which were being advanced as sufficient to constitute the certification of MMI.

We find the evidence sufficiently supports the hearing officer's finding that Dr. C certified that claimant reached MMI on March 12, 1992, with a 10% impairment rating, as well as Conclusion of Law No. 3. No deficiencies in Dr. C's TWCC-69 were complained of at the hearing or on appeal. *See* Texas Workers' Compensation Commission Appeal No. 92453, decided October 12, 1992, concerning the Commission's TWCC-69 form and MMI certification requirements. This was the only factual finding seemingly challenged by claimant. Undisputed on appeal were findings that Dr. C properly reported his findings to carrier on the TWCC-69 on or about October 5, 1992, and that the TWCC-69 was the first document to properly certify the achievement of MMI by the claimant. We have previously observed that "the failure of a health care provider to timely submit required reports does not in and of itself cause the report to lose value or credibility as an expert opinion, or, in the case of a TWCC-69, to fail as a `certification' of MMI and/or an evaluation of impairment. The sanction against a health care provider for failure to submit a certification of MMI timely is found in Art. 8308-10.07(c)(3). Texas Workers' Compensation Commission Appeal No. 92132, decided, May 18, 1992.

Claimant's challenges to Conclusions of Law Nos. 4 through 7 are similarly without merit. TIBS continue until the employee has reached MMI (Article 8308-4.23(b)) and an

employee's entitlement to IIBS begins the day after the employee reaches MMI and continues until the expiration of a period computed at the rate of three weeks for each percentage point of impairment (Article 8308.4.26(c)). *And see* Rule 130.8(a). Also without merit are claimant's disagreements with Conclusions of Law Nos. 8 and 9. In Texas Workers' Compensation Commission Appeal No. 92556, decided December 2, 1992, the claimant was certified by the TWCC-69 of a designated doctor, dated June 9, 1992, to have reached MMI on December 31, 1991, with a five percent impairment rating. The carrier had paid TIBS for 19 weeks beyond the MMI date while the matter of MMI was in dispute. We held that the carrier was entitled to take a credit for the overpayment of TIBS against the IIBS due the claimant and distinguished that case from the situation in Texas Workers' Compensation Commission Appeal No. 92291, decided August 17, 1992, where the carrier had miscalculated the TIBS payments and sought to decrease TIBS payments to offset those it had erroneously paid. Here, the hearing officer reached the conclusion, footed on the unchallenged finding that the carrier terminated claimant's TIBS based on Dr. C's TWCC-64 dated June 4, 1992, that the carrier was entitled to credit TIBS paid after March 12th against IIBS because it paid the excess TIBS due to Dr. C's failure to timely report claimant's MMI correctly. These facts, though distinguishable, more closely resemble the situation involving an underlying MMI dispute in Appeal No. 92556, *supra*, than they do the carrier miscalculation found in Appeal No. 92291, *supra*. Accordingly, relying on Appeal No. 92556 as precedential, we find Conclusion of Law No. 8 sufficiently supported both factually and legally. Conclusion of Law No. 9 correctly states that claimant is entitled to 30 weeks of IIBS and that determination is supported by the formula in Article 8308-4.26(c).

Article 8306-6.34(e) provides that the hearing officer is the sole judge not only of the materiality and relevance of the evidence but also of its weight and credibility. Since the hearing officer's findings and conclusions in this case find sufficient support in the evidence, we do not substitute our judgment for that of the hearing officer. Texas Employer's Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ.) The challenged findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur in the decision. I would further observe that claimant's point of appeal that TIBS should be paid until a TWCC-69 is received by the carrier appears to be based upon a literal and isolated reading of Article 8308-4.26(e), which provides that a carrier shall begin paying IIBS no later than the fifth day after a report certifying impairment is received. It is clear from reading this provision together with Article 8308-4.26(c) that the carrier may also pay in accordance with the substance of that certifying report, and not simply based upon the date of receipt. In this case, the substance of the report was that MMI was reached in March 1992. Consequently, the hearing officer properly considered that entitlement to IIBS, and the beginning of the payment period, was retroactive to the date of MMI. Likewise, the obligation to pay TIBS ceased at that time in accordance with Article 8308-4.23(b).

Susan M. Kelley
Appeals Judge